

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1085

To be argued by
DANIEL J. BELLER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1085

UNITED STATES OF AMERICA,

Appellee,

—v.—

SEBASTIAN INTERSIMONE,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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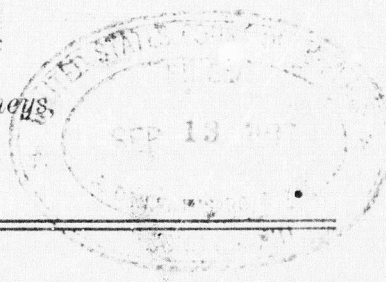


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Preliminary Statement

Sebastian Intersimone appeals from a judgment of conviction entered on January 31, 1977, in the United States District Court for the Southern District of New York, after a fourteen week trial before the Honorable Richard Owen, United States District Judge, and a jury.

Indictment 76 Cr. 324, filed on April 5, 1976 charged Intersimone and thirty-two others in forty counts with various violations of the narcotics laws. Count One charged all the defendants with a conspiracy to violate the federal narcotics laws from January 1, 1968 until the filing of the indictment, in violation of Title 21, United States Code, Sections 173, 174 and 846. Counts Two and Three charged two defendants, Frank Moten and Juan Antonio Alvarez, with engaging in a continuing criminal enterprise in violation of Title 21, United States Code, Section 848. Counts Four through Forty charged substantive violations of the narcotics laws against thirty

defendants. Intersimone was charged in Count Twelve with distributing and possessing with intent to distribute four kilograms of heroin in the Fall of 1971, in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).

Trial commenced on August 10, 1976 as to twenty-two defendants * on a redacted thirty count indictment.** On November 12, 1976, after six and one-half days of deliberations, the jury returned verdicts of guilty against Intersimone on both counts in which he was named, as well as against sixteen other defendants.*** On January 31, 1977 Intersimone was sentenced to a maximum term of fifteen years' imprisonment on Count One, to be followed by a special parole term of three years, and a fine of \$25,000. Intersimone was sentenced to a concurrent

* Four defendants, John Capra, Leoluca Guarino, Steven Dellacava and Helen Kellem were severed prior to trial. A fifth defendant, Solon Glaze, was severed during jury selection due to illness in his attorney's family. Three defendants, Luis Sureda, Michael Parker and Ann Reynolds pleaded guilty and testified for the Government at trial. Two defendants, Eduardo and Lazaro Yaujar, convinced the Government prior to trial that they had no knowledge that their activities were drug related and the Government filed *nolle prosequis* with respect to both defendants. One defendant, Al Williams, a/k/a "Big Al from Chicago," has never been apprehended and is presently a fugitive.

A principal defendant, Juan Antonio Alvarez, was tried *in absentia* under the authority of *United States v. Tortora*, 464 F.2d 1202 (2d Cir.), *cert. denied*, 409 U.S. 1063 (1972). Alvarez, who had been released on bail of \$100,000 surety bond and \$400,000 personal recognizance bond secured by deeds to property in Florida, failed to appear for trial.

** Six counts of the original forty-count indictment charged defendants not on trial and these counts were severed. Four additional counts were dismissed at the close of the Government's case.

*** Four defendants, Donald O'Dood, Marion Dunmore, John P. Morgan and Nelson Alvarez were acquitted and the jury failed to reach a verdict with respect to the defendant Bernard Brightman.

term of fifteen years' imprisonment on Count Twelve and a concurrent three year term of special parole. Intersimone is presently incarcerated and serving the sentence imposed in this case.*

Statement of Facts **

A. Introduction

The investigation and prosecution of this case brought to an end the operations of a massive national and international narcotics organization whose members were responsible for the distribution of hundreds of kilograms of heroin and cocaine throughout major metropolitan centers in New York, Miami, Washington, and Chicago

* The related appeals of fourteen co-defendants, *United States v. Moten, et al.*, Docket Nos. 77-1085-1094 were argued on June 8, 1977 before a panel of this Court (Lumbard, Mulligan, Gurfein, C.JJs) and the convictions of all appellants were affirmed in an opinion filed September 6, 1977, — F.2d — (2d Cir. 1977), slip op. —. Intersimone's appeal was severed by Order dated May 12, 1977 based upon his claim of inability to retain an attorney to process his appeal. By motion dated August 19, 1977 the Government moved to reconvene the original panel to hear this appeal. The motion was granted by Order dated August 29, 1977. A catalogue of the sentences imposed upon the other defendants will be found at pp. 3-4 of the Government's Brief in the related appeals (hereinafter "rel. br.") and at p. 20, fn. 3 of this Court's opinion in *United States v. Moten, supra*.

** In view of this Court's recent decision in *United States v. Moten, supra*, affirming the convictions of Intersimone's co-defendants in an opinion which discusses the facts of this case and disposes of many of the issues raised in this appeal, the Government has sought to shorten its brief by limiting the Statement of Facts to a summary of the conspiracy and a discussion of the activities of the core group and a statement of Intersimone's participation in the conspiracy. For a full discussion of the facts in this case, the Government respectfully refers this Court to pp. 5-46 of the Government's related brief and generally to the opinion in *United States v. Moten, supra*.

for at least the period from 1968 to 1975. The indictment and trial here focused on the activities of narcotics violators operating on the highest-level of business organization. The evidence at trial established a direct line between importers and suppliers of narcotics to the conspiracy and wholesale traffickers who distributed heroin and cocaine in the various cities involved. Their activities revolved around a "core" of wholesale middlemen who purchased bulk quantities of heroin and cocaine from the suppliers and distributed drugs for profit to the wholesale traffickers. A conceptual organizational chart portrays the conspiratorial enterprise as follows:*

* Asterisks denote defendants on trial; defendants-appellants are denoted by underlining. A copy of the chart, although not in evidence, was used by the Government in its opening statement and in summation and was referred to on several occasions by defense counsel as well.

The chart, which appears as Appendix A in the Court's opinion in *United States v. Moten, supra*, reflects paragraphs 5(a) and (b) (1)-(12) of the indictment, which outlined the structure of the conspiracy and the roles played by each of the defendants in furthering its purposes. The indictment summarizes the organization involved as follows:

"The conspiracy took the form of a loose-knit business organization with members of the conspiracy operating at three basic levels. At the first level, some of the defendants and co-conspirators served as importers and sources of supply of narcotic drugs. At the second level, other members of the conspiracy acted as middlemen, purchasing narcotic drugs in wholesale quantities directly from the suppliers. In turn, these middlemen sold heroin and cocaine in multi-kilogram quantities to defendants and co-conspirators at the third level who, in turn, distributed these drugs to their respective customers. Certain of the other defendants and co-conspirators performed specialized functions which were essential to the success of the overall conspiracy. In this fashion, a chain of distribution was established for this narcotics-trafficking business leading from sources of heroin and cocaine through middlemen, wholesalers and retailers and ultimately to narcotic addicts and users in New York City, Washington, D.C., Chicago, Illinois, Miami, Florida, and other cities in the United States."

SUPPLIERS

HEROIN

John Capra ("Johnny Hooks")
 Leoluca Guarino
 Steven Dellacava ("Beansie")

*Sebastian Intersimone
 ("Benny, 'Mr. B'")

COCAINE

*Juan Antonio Alvarez ("Tony")
 *Angel Rodriguez ("Angelo")
 Jose Luis Sureda ("Luis")
 *Nelson Alvarez ("Tony's Brother")
 Eduardo Yaujar ("Angelo's Uncle")
 Lazaro Yaujar ("Angelo's Cousin")

MIDDLEMEN

*Frank Moten

John Brown

Michael Parker

DISTRIBUTORS

WASHINGTON, D.C.

*William Hightower
 *Sidney Foster
 ("Chinch")
 *Joseph Sampson
 ("Bootnose")
 *Lois Sampson

*Bernard Brightman
 Solon Glaze
 *John Morris
 ("Papers")
 *Lawrence Mitchell
 ("L.J.")
 Willie Womack

NEW YORK - NEW JERSEY

*Don Wilson
 *Albert Lee Jones
 ("Al from Norfolk")
 *James Laws
 ("Tobe the Robe")
 *Charles Cowpers
 ("Chi")
 *Marion Dunmore

*Tommy Davis ("Bifty")
 *John P. Morgan ("J.P.")
 *Raphael Bonilla
 ("Spanish Michael")
 ("Little Michael")
 Helen Kellem ("Pam")
 Ann Reynolds
 (Lois' Sister)

CHICAGO, ILL.

*Yvonne Alvarez
 Schennault
 Al Williams
 ("Big Al from Chicago")
 *Donald O'Dood

The evidence at trial established that Juan Antonio Alvarez and Angel Rodriguez, Miami residents, were the principal suppliers of cocaine to the conspiracy, selling approximately eighty kilograms yearly between 1968 and 1974; that Sebastian Intersimone, while living in New York City and later in Accord, New York, was a supplier of heroin to the conspiracy, as were John Capra, Leoluca Guarino and Steven Dellacava; that Jack Brown aided and advised by Frank Moten and, after 1971, by Michael Parker, Brown's son-in-law, constituted the core group and focal point of the enterprise, buying heroin and cocaine in bulk and reselling to their wholesale customers. The evidence also established that as narcotic drugs were flowing through the organized channels of distribution of this conspiracy to the streets, cash money in the millions of dollars was flowing up from the streets in small denomination bills to the core group and suppliers. The Government's proof showed the core group in possession of more than two million dollars between 1969 and 1973 and the proceeds of this venture no doubt exceeded that figure many times over.

The Government's evidence was presented through more than two hundred documentary exhibits, including telephone toll records, hotel registration slips, travel receipts, credit card purchase slips,* photographs, letters; car vehicle registrations and papers seized from the defendants; and through the testimony of more than thirty-five witnesses, including six participants in the conspiracy—Jack Brown, Michael Parker, Luis Sureda, Ann Rey-

* Almost all the documentary proof was reduced to simplified chart form, which charts were received in evidence as an aid to the jury (GX 150-158; 178-180). These charts are reproduced as part of the Government's Appendix filed in the related appeals.

As used in this Brief, "Tr." refers to the trial transcript; "GX" to Government Exhibits at trial; "DX" to Defense Exhibits marked at trial; "Br." to Appellant's Brief.

nolds, Marion Ladd and Estelle Tompkins—who testified concerning the range and scope of the defendants' activities.

B. The Government's Case

1. The Core Group: Jack Brown, Frank Moten and Michael Parker

a. Jack Brown and Michael Parker

The evidence showed that Jack Brown was a bulk purchaser of cocaine and heroin before and during the period of the conspiracy, and that he distributed these narcotics to customers in New York, and to others who came periodically from Chicago and Washington to New York to purchase both heroin and cocaine from him.*

* Brown was born in Washington, D.C. in 1928 where he lived until 1954. By that time he had already had a series of arrests and convictions, beginning in 1944, for shoplifting and possession of narcotics. Brown testified that he had become addicted to heroin in 1946 and remained addicted until 1954 or 1955 when he served a six months sentence at Rikers Island jail after which he decided to break his habit. Thereafter, Brown never again used heroin intravenously although he occasionally "snorted" heroin when depressed and frequently snorted cocaine.

Brown began selling drugs in New York in the 1950's. He lived for a time in a rooming house on 126th Street where he met some of his later associates and co-conspirators, such as Frank Moten, Solon Glaze and Willie Womack. In 1959 he was introduced to co-conspirator Sebastian Intersimone who began selling heroin to Brown. In 1960 Brown was arrested and convicted in Washington, D.C. for violating the federal narcotics laws. He was incarcerated in Atlanta penitentiary where he met, among other people, Leo Guarino, who, in 1970, became one of his principal heroin suppliers. Brown was released from Atlanta in 1964 and returned to New York where he committed a series of burglaries with an associate named Antonio Perdiz. By 1965, Brown was back in business selling heroin purchased from Intersimone and others, and cocaine, a trade he maintained until 1975. (Tr. 987-995, 999-1000, 1182, 1243).

At a conservative estimate, Brown purchased and resold between 45-80 kilograms of cocaine each year between 1969 and 1974, and perhaps 10-20 kilograms of heroin annually between 1970-1973. Michael Parker, who married Brown's daughter in 1969, moved to New York in early 1971 and slowly came to play an important role in this conspiracy as Brown's bodyguard, messenger-boy and later as a narcotics dealer in his own right.

Between 1968 and 1972 during the course of the conspiracy, Brown lived in and used various apartments in Manhattan where he stored his narcotics and to which his suppliers and customers came to deliver and purchase drugs.* In November, 1972, Brown, with his wife, Jan, moved to a home in Orangeburg, New York, where he lived and continued his narcotics activities until April, 1973.** At that time, after learning that he had been indicted for violations of the federal narcotics laws,*** Brown went "underground," living first in an apartment

* From 1966-1969 Brown lived at 60 Riverside Drive on 78th Street; from 1969-1972 he lived at 180 West End Avenue in an apartment complex known as Lincoln Towers. Brown also maintained a "stash" apartment from 1971-1972 at 56th Street, between Eighth and Ninth Avenues, and a room in the apartment of Carol Cuffee at 200 West 90th Street. (1045-46, 1087, 1093-94).

** While Brown lived in Orangeburg, New York, he also maintained an apartment at 135 West 96th Street where he did business while in the city. Brown also sold drugs from the apartment of his common-law wife, Jodi, at 10 West 66th Street and at 120 W. 97th Street. (Tr. 1327-28).

*** Brown was charged in indictment 73 Cr. 331, filed in the United States District Court in the Southern District of New York on April 13, 1973, with conspiring with John Capra, Leoluca Guarino and Steven Dellacava to violate the federal narcotics laws. Brown testified that he read about his indictment and about the arrest of Capra, Guarino and Dellacava in *The New York Times* on April 15, 1973. Brown went into "hiding" thereafter. (Tr. 1359-1360).

in Manhattan * and then, in May, moving to an apartment in Coney Island.** Brown remained in the New York area until November, 1973, when he moved to Miami. He lived first in the home of his cocaine supplier, Juan Antonio Alvarez, and then in various apartments until November, 1974. (Tr. 1372-75). While in Miami, Brown continued to receive cocaine from his suppliers, and to sell drugs to certain customers, notably Yvonne Schennault, Don Wilson and, on one occasion, Charles Cowpers. In this connection, Michael Parker ***

* This apartment, located at 139th Street and Riverside Drive, was made available to Brown by his longtime customer and friend, Raphael Bonilla. (Tr. 1360).

** This apartment, located at 2828 Twenty-Eighth Street, belonged to Raphael Bonilla's girl friend, Gwen. (Tr. 1360).

*** Parker, who was 26 years old at the time of trial, testified that he was born in North Carolina and moved with his family to Maryland in 1967. He met Jaqueline Brown, Jack Brown's daughter, in high school and married her in 1969. Parker, who did not know the nature of his father-in-law's business until early 1971, was introduced to Frank Moten and William Hightower at his wedding by Jack Brown. In 1970, at the time of his daughter's Christening in Maryland, Brown introduced Parker to Joseph and Lois Sampson and Sidney Foster in the apartment of William Hightower. (Tr. 3268-3279). In August, 1970, Brown asked Parker to pick up a brown paper bag with money from Joseph Sampson and bring it to New York which Parker did. (Tr. 3280-3282). In October, 1970, Brown invited Parker to join him in Atlanta, Georgia, for a heavyweight boxing match between Muhammed Ali and Jerry Quarry and attendant celebrations. Parker flew to Atlanta with Joseph and Lois Sampson and, while there, met Brown's other guests, who included cocaine suppliers Tony Alvarez and Angel Rodriguez, Frank Moten, Tommy Davis and other of Brown's associates. (Tr. 3282-3285). After Parker moved to New York in February, 1971, he gradually became assimilated into the affairs of the conspiracy. Through conversation and personal dealings, he learned the identities of Brown's suppliers—Alvarez, Rodriguez, Capra, Guarino, Dellacava and Intersimone—and his customers. He testified that he delivered narcotics to, or observed drug transactions by, almost all of the defendants on trial. (Tr. 3292-3297).

made frequent deliveries of cocaine in 1974 to two of Brown's Washington customers, William Hightower and Sidney Foster. In December, 1974, Brown left Florida and spent several months travelling between Washington and New York, trying to avoid arrest by the Government and harm from his narcotics associates. On April 6, 1975, no longer able confidently to elude federal authorities and fearful that his life was in danger, Brown surrendered to the Government and agreed to cooperate in exchange for protection. (Tr. 1415, 1425; GX 122).

b. Frank Moten *

Throughout the period of the conspiracy, Frank Moten was the principal advisor to and partner of Brown in his activities. Brown first met Moten in 1954 in New York and they became associated in business in the late 1950's when Moten used Brown's drug profits for his own ventures. (Tr. 1243-47). In 1965, after Brown was released from Atlanta penitentiary and returned to New York, Moten again took Brown under his wing. He encouraged Brown to set himself up in a legitimate business as a "front," as Moten had done with his own laundromat on Seventh Avenue and 123rd Street. Brown agreed and the two became partners for a short period in the Harlem Print Shop. (Tr. 1248-1251).

* Moten's role in the conspiracy was accurately described in the indictment as follows:

"Defendant Frank Moten, a/k/a "Uncle," was an advisor to John Brown, a/k/a "Jack," delivered narcotic drugs to Brown and received drugs from him, introduced certain defendants and co-conspirators to Brown for the purpose of purchasing drugs, vouched for them as reliable persons, financed the narcotic operations of several of the defendants and co-conspirators engaged in financial dealings for Brown and other of the defendants and co-conspirators, and shared in the profits of the conspiracy."

Moten's financial dealings with Brown were not limited to advice. Beginning in 1966 and continuing through the end of 1972 or the middle of 1973, Moten exchanged money on a large scale for Brown, using the facilities of Chase Manhattan Bank, to exchange the small denomination bills—ones, fives, tens and twenties—in which Brown was paid by his drug customers, for large denomination bills—fifties and hundreds—which Brown used, among other things, for payment to his bulk suppliers. (Tr. 1251-1255).^{*} Indeed, after 1969, Moten's financial interest in Brown's narcotics activities became even more lively.^{**} During one of their frequent cocaine snorting sessions, Brown told Moten he was making more money than ever before as a result of his newly acquired cocaine connection, and that he kept much of the money at his

^{*} Edward Arroyo, who was the head teller at a Chase Manhattan branch located at 135th Street and Fifth Avenue testified that as head teller he was in charge of "large" bills and that during his tenure at the bank, from 1969 to 1971, he exchanged small bills for large ones for only one customer, Frank Moten. Moten came to the bank twice weekly with brown paper bags filled with money. Arroyo testified that Moten exchanged approximately \$8,000 each week. (Tr. 6057-6061). Hannah Forrest, who succeeded Arroyo as head teller at Chase Manhattan, testified that she exchanged small bills for large for Moten between 1971-1974 on the average of \$10,000 each week, and that on one occasion she exchanged as much as \$50,000 for Moten. (Tr. 6033-6035). She also testified that she saw Frank Moten socially at various apartments he used in New York City; that she and Moten used cocaine together; that she knew Jack Brown and had seen him socially; and that Moten got his cocaine from Jack Brown. (Tr. 6004-6111).

^{**} Brown testified that he told Moten all about his drug activities, including the identities of his sources, of whom Intersimone was one, and customers. (Tr. 1191-1192, 1255-56). Much in the way Brown relied on Intersimone for "experienced" advice on the ins-and-outs of the drug traffic among Italian entrepreneurs, he relied on Moten for advice on the Harlem operators they both knew so well. Thus, it is hardly surprising that Brown regarded Moten as a "confidante" (Tr. 1189).

home. Moten told Brown that he was foolish to keep his money where he was "dirty," that is, where he kept his drugs.* Moten suggested that he personally take custody of Brown's money, that he would use it for his own purposes interest-free, and that he would, if given sufficient notice, make available to Brown the large sums he needed to pay his bulk suppliers at the time of their drug deliveries.** Brown adopted Moten's proposal and thereafter gave Moten approximately \$60,000 in small bills each month for safekeeping and received money from Moten, in large bills, when a payment was due. (Tr. 1256-59).***

Moten was directly involved in the drug activities of the conspiracy in other ways as well. Throughout the period of the conspiracy indeed as early as 1965, Moten obtained from Brown approximately one ounce of cocaine each week. (Tr. 1260). In 1967 Moten introduced Brown to William Davis ("Bubba from Boston") and asked Brown to sell cocaine to Davis. Brown agreed, on condition that Moten guarantee the sale, which Moten consented to do. Thereafter, through mid-1973, Brown sold one or two ounces of cocaine each month to Bubba Davis

* Brown had a hidden "trap" in his apartment at 180 West End Avenue where he kept both drugs and money. (Tr. 1257).

** Moten was introduced to Rodriguez and Alvarez, whom Moten knew to be Brown's cocaine suppliers, in Atlanta in October 1970 during the Ali-Quarry fight. (Tr. 1255-56).

*** Intersimone's claim here that he had no knowledge of the larger scope of the conspiracy is belied by the record. Among other things, Brown testified that he told Intersimone, as well as Hightower, Joseph Sampson and Parker of the money-exchange arrangement with Moten (Tr. 1260). Moten had a similar financial relationship with co-conspirator Willie Womack, an associate of Brown's and Moten's from the 1950's and a customer of Brown's from 1970 until the time of Womack's death in June, 1972. According to Brown, Moten was holding \$100,000 of Womack's money at the time Womack was murdered. (Tr. 1272-74).

on his trips to New York, and gave an additional one or two ounces to Moten for Davis at the same rate. (Tr. 1260-63). Moten also introduced Brown to co-defendant Bernard Brightman, a neighbor of Moten's in Englewood, New Jersey.* On Moten's advice, the ownership of Brown's Orangeburg home was placed in Brightman's name to avoid problems with the Internal Revenue Service. (Tr. 1323-27; GX 4D-1, D-2). In September, 1972, Moten asked Brown to sell cocaine to Brightman with Moten's promise to "stand for the package." Brown delivered one-eighth kilogram of cocaine to Brightman at Moten's house (Tr. 1315-16), and continued to sell cocaine to him—as much as two kilograms on one occasion—through September, 1974, transactions guaranteed "one hundred percent" by Moten. (Tr. 1384).**

Moten also financed the narcotics purchases of co-defendants Solon Glaze and John Morris, who were partner-customers of Jack Brown.*** And finally, in

* Brown met Brightman in 1966 and, through 1973, snorted cocaine with him and Moten on several occasions in Moten's home. (Tr. 1297-1300, 1314-16).

** In January, 1973, Brightman met Angelo Rodriguez and Tony Alvarez in Brown's Orangeburg home and learned that they were his cocaine suppliers. (Tr. 1337-1341). Brown saw Brightman for the last time in September, 1974, in Miami when Brightman asked to be introduced directly to Brown's suppliers and Brown refused. (Tr. 1412-14).

*** Marion Ladd testified that she lived with both John Morris and Solon Glaze in the 1950's and again was involved with both men in the 1970's and that she had met Moten in the 1950's. Glaze told Ladd on several occasions that Moten was backing his and Morris's drug purchases, and that Moten came to their apartment four to five times each week to deliver money. Ladd testified that on several occasions she went with Glaze to pick up money from Moten at his laundromat; with Morris to pick up \$30,000 from the laundromat; and with Glaze and Morris to pick up the money for drugs from Moten at his home in New Jersey. (Tr. 4701-04, 4712-4724).

September and October, 1972, when Brown was short of supplies of drugs, Moten obtained for him a kilogram of cocaine on two separate occasions. (Tr. 1317-1320).*

In sum, Moten played a key role in this conspiracy providing essential services for the core group and for many of the co-conspirators while at the same time sharing in the tremendous monetary rewards of the enterprise at seemingly no risk to himself.

2. The New York Heroin Connection

a. Sebastian Intersimone

The chain of heroin distribution that formed a central part of the activities of this conspiracy was forged as early as 1959 when Jack Brown was introduced to Sebastian Intersimone by James Richardson.** Intersimone, who sold only pure heroin coming directly from overseas, sold to Brown first one, then two, kilograms prior to Brown's arrest in 1960. Upon Brown's return to New York in 1964, Intersimone resumed his close friendship and business dealings with him and almost immediately thereafter again sold to Brown approximately two kilograms of heroin. (Tr. 1030-33). During this period Intersimone

* Brown testified that Moten obtained the cocaine on both occasions from Jimmy Richardson, a mutual friend, who had obtained it from Chili Marquez, the brother of "Spanish Raymond" Marquez, and a close friend of Moten's. (Tr. 1318). This was the same Jimmy Richardson who had introduced Brown to Sebastian Intersimone in 1959 as a heroin supplier. (Tr. 999-1004). The jury convicted Moten on Counts Eight and Nine of the indictment which related to these two deliveries.

** As noted earlier, Richardson's involvement is significant since later, in October, 1972, Richardson was instrumental in obtaining two kilograms of cocaine for Frank Moten which the latter sold to Jack Brown.

acted as an advisor to Brown, discussing the narcotics business and the trustworthiness of various dealers with whom Brown was transacting business. (Tr. 1138-1142).^{*} In addition, Intersimone, however cautiously, continued his own direct participation in the narcotics traffic. In 1969 he negotiated with Brown to sell him a kilogram of heroin which he delivered to Brown's New York apartment only to learn that the package contained epsom salts. Intersimone promised to "make it up" to Brown and the incident did not rupture relations between the men. (Tr. 1142-44). In the Fall of 1971 Intersimone negotiated with and delivered to Brown four kilograms of pure heroin.^{**} Intersimone told Brown "he had scored for some heroin and that he was giving [Brown] first choice." Intersimone asked Brown to "speed it up and turn it over as fast as I could." (Tr. 1146). Brown tested the heroin and found it was "very good"; thereafter Brown sold the heroin over a period of months to wholesale customers in New York and Washington, D. C. (Tr. 1147). Intersimone, who charged Brown \$20,000 per kilo, met Brown in the succeeding weeks at locations in upstate New York near Intersimone's house in Accord, at which time Brown paid for the delivery of heroin. These payments were completed by January, 1972. (Tr. 1144-47).^{***}

^{*} Brown testified that at various times he purchased large amounts of heroin from "Patty Pontiac", "Jinx" and Joe Paradise from the "Pleasant Avenue" area. Intersimone, who was aware of Brown's activity, told Brown that dealers from that area could not be trusted. (Tr. 1142).

^{**} Among the recipients of this pure heroin, which Brown mixed with heroin he had on hand from Capra, Guarino and Dellacava, were co-defendants William Hightower, Sidney Foster, Joseph Sampson, Lois Sampson, Tommy Davis, and acquitted co-defendant Marion Dunmore. (Tr. 1147-1149).

^{***} Intersimone was convicted on Count Twelve of the indictment which charged him with the sale of the four kilograms of heroin in the Fall of 1971.

On one occasion when Intersimone came to see Brown in New York to pick up part payment for the four kilogram shipment, Intersimone met Frank Moten in Brown's apartment. Brown said "Frank, this is Benny that I told you about," and "Benny, this is Frank that I have spoke to you about." (Tr. 1263). Brown described to the jury the protective function Intersimone played by explaining that Intersimone "had his arms around me," a phrase suggesting that Brown's associates knowing of his relationship to Intersimone, would be reluctant to do him harm. Moten acknowledged to Intersimone that he, like Intersimone, "wouldn't want anything to happen to" Brown. (Tr. 1263). Sometime later, Intersimone asked Brown to help him avoid problems with the Internal Revenue Service by having some of the drug-payments he had received that Fall "legalized." Brown spoke to Moten who agreed to arrange for a fictitious loan of \$20,000 to Intersimone from one of Moten's associates in Boston, Peter Fiumara, thereby enabling Intersimone to convert illegal profits from his heroin transactions into an apparently lawful cash asset. In April, 1972, Intersimone gave Brown \$20,000 and Brown flew with Moten to Boston, where Moten introduced Brown to Peter Fiumara, who was, among other things, the President of Brunswick Finance Corporation.* Moten explained to Fiumara the purpose of their visit and Brown gave Fiumara the \$20,000 in cash. Fiumara gave Brown a certified check payable to the order of Sebastian Intersimone, thereby allowing Intersimone to "launder" his narcotics

* The timing of this transaction was further corroborated by telephone toll records showing a single call from Moten to Intersimone on April 6, 1972, and a call from Brown to Intersimone on April 6, 1972. The check was dated April 12, 1972. (GX 150, 151; G. App. 3, 4).

profits and to explain away his sudden acquisition of cash as a "legitimate" loan. (Tr. 1265-68; GX 42).*

Brown continued to see Intersimone throughout the period he remained in New York and spoke to him occasionally in 1974 while Brown was in Florida. In 1975, Brown returned to New York, went into hiding and recuperated from a self-inflicted gun wound suffered in Washington, D.C. In March, having recovered, Brown telephoned Intersimone ** and told him he was well again. Intersimone told Brown that had Brown called earlier Intersimone would have had "good news" because he "had something decent" for Brown, code between the men for a supply of heroin. (Tr. 1424-25).

* Indeed, Peter Fiumara, who was called as a Government witness at trial, persisted in this explanation of the event, even after invoking his Fifth Amendment privilege outside the presence of the jury, and after having immunity conferred upon him. On direct examination Fiumara identified GX 42 as a \$20,000 check he issued to Intersimone on April 12, 1972 upon the instructions of Frank Moten. (Tr. 6098-6107). On cross-examination by Moten's attorney, Fiumara "explained" that he was in the "business" of making loans through the Brunswick Finance Corporation, and that the \$20,000 "loan" to Intersimone had been secured by gold coins given to Moten, Fiumara's old friend, by Jimmy Richardson. (Tr. 6108-6111). On redirect examination by the Government, Fiumara admitted that his business was nothing more than a checkbook with his home address, which he kept at home, and that his regular business consisted of operating a bar. As for his "loan" to Intersimone, he testified that he never met the defendant, that he never saw or received the collateral for the loan, that in the four years that elapsed he had never received any interest payment on the loan and that no part of the principal had been repaid. (Tr. 6111-6124).

** Telephone toll records received in evidence for Louise Sanford, in whose home Brown recuperated, reflected a telephone call to Intersimone's telephone number in Accord, New York, on March 30, 1975. (GX 64, 151; G. App. 4).

b. Capra, Guarino and Dellacava

Brown also obtained heroin, though of lesser quality, at a steady clip from another source: John Capra, Leoluca Guarino and Steven Dellacava, partner-suppliers of Brown. Between March, 1970 and April, 1973,* these men supplied Brown with heroin in amounts varying from half-kilograms to three kilograms—once or twice each month.

3. Roles of Remaining Defendants **

C. The Defense Case

Intersimone did not testify and called no witnesses.*

* In February, 1970, Brown attended a championship boxing match between Joe Frazier and Jimmy Ellis at Madison Square Garden, in the company of appellant James Laws and an associate named "Red Ike." During the fight, Brown recognized another spectator as Leo Guarino, whom Brown had met in Atlanta Penitentiary in the early 1960's. Brown went over to Guarino who introduced Brown to his friends "Johnnie" (John Capra) and "Beansie" (Steven Dellacava). Brown told Guarino that he was again selling drugs and Guarino advised Brown that he could supply him with heroin. This he began to do on a regular basis beginning in March, 1970. (Tr. 1107-1116).

** The roles of the remaining co-conspirators are discussed as indicated earlier, in the Government's related brief as follows:

- A. The Miami Cocaine Connection: Juan Antonio Alvarez and Angel Rodriguez. (Rel. Br. 17-22)
- B. The Wholesale Distributors
 - 1. The Chicago Outlet (Rel. Br. 26-30)
 - 2. The Washington, D.C. Wholesalers (Rel. Br. 30-35)
 - 3. The New York Outlet. (Rel. Br. 36-46).

*** Intersimone offered in evidence exhibits PPP, QQQ, RRR, and SSS, maps generally showing the distances between New York City and Accord, New York.

The evidence presented by other defendants is summarized at rel. br. 47-49.

A R G U M E N T

POINT I

The jury properly found a single conspiracy among the defendants and their co-conspirators to traffic in narcotics and the evidence amply supported the jury's finding of Intersimone's membership in that conspiracy; Intersimone was not entitled to a severance based upon the trial format.

1. Single Conspiracy

Intersimone seeks reversal of his conviction on the ground that the proof at trial showed multiple conspiracies. The identical issue was raised in the related appeals by Intersimone's co-defendants and this Court rejected that contention concluding that "there was sufficient evidence to permit the jury to find the single conspiracy alleged." *United States v. Moten, supra*, slip op. at —, typed opinion at 7. On this question the Government respectfully refers this Court to rel. br. 50-60 and to *United States v. Moten, supra*, slip op. at —, typed opinion at 4-8.

Intersimone also argues that there was insufficient evidence linking him to the single conspiracy proved at trial. The evidence, however, warranted the jury's conclusion that Intersimone participated in this single ongoing conspiracy with knowledge of its broad scope. His relationship with Jack Brown extended from 1959 through the final days of the conspiracy. He furnished Brown with "pure" heroin, showing that if Intersimone was not himself an importer, he received his heroin directly from those who were. He clearly knew that the drugs, once sold, would be processed, repackaged and resold from the core group to wholesalers and retailers and ultimately to addicts in the street. Indeed, he specifically told Brown after selling him four kilograms of pure heroin

in 1971 to "turn it over" as quickly as possible. (Tr. 1146). Thus Intersimone knowingly participated in the chain of distribution leading from importer to drug addict, and shared in the profits of the venture.

Moreover, because of his special relationship with Brown, Intersimone had actual knowledge of the scope of the conspiratorial enterprise for the simple reason that he inquired about it, and Brown told him about his extensive dealings. Intersimone, who advised Brown on the best method of dealing with other drug suppliers, also knew the details of Brown's relationship with Frank Moten. Since Intersimone knew that Brown was a drug entrepreneur who was exchanging approximately \$60,000 each month, Intersimone knew that the scope of Brown's activities, and the conspiratorial network in which such activities necessarily occurred, were far broader than the simple relationship existing between the two men.

Indeed, the "mutual dependence and assistance" that characterizes narcotics enterprises of the type proved at trial, *United States v. Tramunti*, 513 F.2d 1087, 1106 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975), redounded to Intersimone's benefit as well. When, in the Spring of 1972, he sought to hide the proceeds of his earlier sale of four kilograms of heroin, he made use of Moten's financial expertise and assistance to the conspiracy by "laundering" twenty-thousand dollars with the help of Brown, Moten and Peter Fiumara—profits from drugs which, the proof established, were ultimately delivered to defendants in this case. Thus, the scope of the enterprise, and the specialized function played by some of its participants, was of direct benefit to Intersimone.

In this light, Intersimone's embrace of the "single act" doctrine reflects a complete misunderstanding of the facts in this case and the applicable legal standards involved. The short answer to his claim is that the record shows not a single but repeated conspiratorial

acts by Intersimone: his advice and counseling to Brown; his willingness to "reach out" for Brown to obtain a kilogram of heroin on short notice in 1969; his sale of four kilograms of pure heroin in the Fall of 1971; his use of the conspiratorial "banking" facilities to launder \$20,000 of drug profits in April, 1972; and finally, his conversation with Brown in March, 1975, in which Intersimone would have had something "decent" for him.*

Moreover, the single act doctrine can benefit a defendant "only when there is no independent evidence tending to prove that the defendant had some knowledge of the broader conspiracy and when the single transaction is not itself one from which such knowledge might be inferred." *United States v. Agueci*, 310 F.2d 817, 836 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963). Here, as indicated there was substantial independent evidence showing Intersimone's knowledge of the broader objectives of the conspiracy, including Brown's own discussions with Intersimone about the scope of his activities. In addition, the background evidence relating to Intersimone's sales of kilogram quantities of heroin to Brown in 1959 and 1965, and his knowledge of Brown's incarceration for conspiracy to sell narcotics in 1960, strongly supported the conclusion that he had knowledge of the broader conspiracy.**

* Thus, Intersimone's activities disclose a pattern wholly different from that of the defendant Alonzo Ware in *United States v. Tramunti*, *supra*, 513 F.2d at 1112, whose sole role consisted of purchasing two ounces of heroin on consignment for which he never completed the \$2,000 payment, and who was present on one other occasion during a narcotics transaction.

** There is no merit to Intersimone's argument with respect to the alleged inadmissibility and prejudicial effect of so-called prior similar acts. Intersimone argues that since he was charged with the substantive offense of distributing and possessing with intent to distribute four kilograms of heroin in the Fall of 1971, the only trial issue with respect to him was whether the transaction occurred, and if so, when. He contends that evidence of

[Footnote continued on following page]

Finally, Judge Owen properly charged the jury on the law, and no exception was taken to the charge. (Tr. 8959-8960). The issue of Intersimone's membership in the conspiracy was one for the jury, and the evidence more than justified their verdict of guilty.*

his earlier dealings with Brown was irrelevant to this issue and should therefore have been excluded. (Br. at 35). Brown's testimony in connection with his early dealings with Intersimone was received, however, solely on the *conspiracy* charge, which Intersimone ignores, and the jury was charged that such testimony could be considered "only on the question of whether a defendant became a member of the conspiracy charged in this indictment, it is only background. . . ." (Tr. 8971-72). It is absurd for Intersimone to argue here that he lacked knowledge of the overall scope of the conspiracy and did not "agree" to join it, and in the same breath to urge that evidence of his intent and knowledge—classic justifications for the proof of prior criminal acts—was irrelevant to the issues at trial. Intersimone's prior dealings with Brown were highly probative of his state of mind with respect to the conspiracy charged and were therefore admissible.

Indeed, the evidence of Intersimone's early dealings was not offered by a surprise witness bearing no relationship to the conspiracy. Since Brown was testifying about a continuous course of conduct with Intersimone, the testimony related directly to the conspiracy charged in the indictment by tending to prove its nature, scope and purpose, as well as to show the prior relationship of the witness with the defendant, a matter of significance to a jury seeking to understand the basis for mutual trust between the participants. As such the evidence was admissible on the issue of the existence of the charged conspiracy. *United States v. Moten*, *supra*, slip op. —; typed opinion at 11; *United States v. Araujo*, 539 F.2d 287, 289 (2d Cir. 1976); *United States v. Papadakis*, 510 F.2d 287, 294-95 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States v. Cioffi*, 493 F.2d 1111 (2d Cir. 1974); *United States v. Cohen*, 489 F.2d 945 (2d Cir. 1973); *United States v. Costello*, 352 F.2d 848, 853 (2d Cir. 1965), *re'd on other grounds*, 390 U.S. 39 (1968); *United States v. Witt*, 215 F.2d 580 (2d Cir. 1954); *Dennis v. United States*, 183 F.2d 201, 231 (2d Cir. 1950), *aff'd* 341 U.S. 494 (1951).

* Intersimone's claim that the evidence was insufficient to convict as a matter of law is similarly without merit. (Br. 37-43).

[Footnote continued on following page]

He argues that Brown's testimony as to the date of the four kilogram heroin sale by Intersimone to Brown was so self-contradictory as to constitute reasonable doubt. The facts, however, are otherwise.

Concededly, the four kilogram heroin sale by Intersimone was a pivotal act in terms of his culpability for the crimes charged in the indictment. On direct examination Brown testified that the sale occurred in the Fall, 1971. (Tr. 1145-1147). On cross-examination Brown was shown a typed transcript of a tape recorded interview and debriefing between Brown and FBI agents on May 4, 1975, shortly after his surrender, which stated that the transaction occurred in "1970, 1971, right after my son died Benny didn't do anything." (GX 3505-0-5, p. 12). When confronted with the transcript Brown acknowledged that he may have said 1970, and that he was not sure whether the transaction occurred in 1970 or 1971. On redirect examination, however, the apparent confusion was eliminated when the original tape recording was played for the jury, clearly showing Brown, even in May, 1975, placing the transaction in the Fall of 1971. (During the conversation, Brown paused to reflect on the date, concluding with 1971, leading the typist incorrectly to transcribe 1970). Moreover, other prior statements of Brown's definitively established the Fall of 1971 as the date of the transaction because throughout Brown related the sale and his payment for the heroin, which lasted several weeks, to his son's death in January, 1972, by which time the payments were complete.

Brown concluded his testimony saying he had "no doubt at all" that the transaction occurred in the Fall of 1971. (Tr. 2885-2900). Thus, the jury had Brown's clear recollection that the transaction occurred in the Fall of 1971, and the court carefully charged on the importance of this date in regard to the statute of limitations. Specifically, Judge Owen instructed the jury to acquit even if they believed the transaction took place in either 1970 (prior to the statute of limitations) or the Fall of 1971. (Tr. 9045-46).

Moreover, in view of the amount of money paid for the drugs, Intersimone's own statement to Brown that he had "scored" heroin and that Brown should "turn it over" as quickly as possible, and Brown's testimony that he tested the substance and found it was "very good," the jury could properly find that the substance involved was heroin. It was the province of the jury to "weigh the evidence and draw justifiable inferences of fact," *United States v. Taylor*, 464 F.2d 240, 243 (2d Cir. 1972); *United States v. Zanfardino*, 496 F.2d 887 (2d Cir. 1974).

Severance

Finally, Intersimone urges error in the denial of his motion for a severance, and from alleged prejudice resulting from a "mass trial." (Br. 25-29). To a large measure these claims rest upon, and do no more than re-argue, the claim of proof of multiple conspiracies, spill-over from the admission of similar acts and the Government's alleged proof of only a "single act." Since, as argued earlier, these claims are without merit, they cannot support the conclusion of prejudice that Intersimone advances. Intersimone also argues that the trial was somehow "unfair," and that the trial format violated this Court's directives in *United States v. Sperling*, 506 F.2d 1323, 1340-41 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975) (Br. at 53). These contentions, advanced by all defendants on appeal, have been rejected by this Court in *United States v. Moten*, *supra* slip op. at —, typed opinion at 9-13; *see also* rel. br. at 60-80.*

* Two factual matters, not mentioned by other defendants in the related appeal, but noted by Intersimone here, merit brief response. First, it is argued that a drunken outburst by Intersimone during the trial contributed to the "circus-like" atmosphere of the trial. While the record establishes that the trial was conducted in a spirit of particular decorum, it is hard to imagine how Intersimone, a self-acknowledged alcoholic, would have avoided this incident with a severance, since his conduct could just as well have occurred at any trial in which he was a defendant. Finally, the bare claim that DEA Agents "personally assisted the jurors throughout the trial," is a fabrication. No Government agents had any involvement with the jury in any way. Since the matter has been raised, however, it should be clear that the only participants in the trial who communicated or sought to communicate with the jury were the defendants, and in particular Intersimone, *see In the Matter of a Grand Jury Subpoena Served Upon David Doe*, Dkt. No. 77-1047, slip op. 2403 (2d Cir. March 17, 1977).

POINT II

The court did not abuse its discretion in refusing to authorize funds for a psychiatric analysis of Brown's testimony.

Intersimone claims error in the district judge's denial "of motions by defendants for a psychiatric evaluation of . . . John T. Brown." (Br. 44). This claim is without merit.

The Government's search of the record discloses no occasion when any counsel sought a psychiatric evaluation of Brown, and Intersimone points to none. A pre-trial motion for disclosure of existing psychiatric records of Brown was filed and denied by the Court without prejudice to renewal at a later date; see Memorandum and Order, No. 44760, July 14, 1976, reprinted in Appellants Joint Appendix in the related appeal, at 139.*

During trial, application was made, *ex parte*, by appointed counsel for defendant Joseph Sampson requesting the Court's authorization of funds under the Criminal Justice Act ("CJA") for a psychiatric evaluation of a letter written by Brown to the F.B.I. The Court approved the expenditure. Thereafter, the same attorney sought additional CJA funds for "extensive work" including a psychiatric evaluation of Brown's testimony. (Tr. 4009). The Court, after considering the matter overnight, denied the request.

Intersimone, who had privately retained counsel, had not joined in the motion, which was brought under the CJA. The record shows that neither Intersimone, nor any of the other defendants with privately retained coun-

* At trial Brown testified he had never been psychiatrically examined.

sel, sought to hire their own psychiatrist to examine the material;* nor did Intersimone, nor any other attorney whether retained or assigned, make any offer of proof as to what a psychiatrist could conceivably say that might bear on the trial. Intersimone's failure to utter even a single word on this matter below bars him from pressing this issue on appeal.

In any event, this Court has already concluded that "the determination as to whether or not psychiatric testimony was admissible to impeach the credibility of Brown was clearly within the discretion of the trial judge . . .," and that there was no abuse of discretion in this case. *United States v. Moten, supra*, slip op. at —, typed opinion at 13-14.**

POINT III

Intersimone's claims of prosecutorial misconduct are without merit.

Intersimone argues that various incidents of alleged prosecutorial misconduct in connection with the trial of this case justify reversal by this Court under its supervisory authority. The claim is without foundation in the record and should be rejected.

A. Alleged Rejection of *Sperling* Doctrine

Intersimone argues that the Government indicted and brought to trial too many defendants in an indictment

* Sampson's attorney himself gave the cue to any other defendant with any interest in this matter by telling the Court:

"I must say though, your Honor, you have to consider one thing that if I wasn't appointed counsel I wouldn't have to ask your permission." (Tr. 4051-52).

** The issue is also treated at rel. br. 107-114, to which the Government respectfully refers this Court.

format previously the subject of a warning by this Court in *United States v. Sperling, supra*. This claim, raised by all appellants in the related appeal, has been rejected by this Court in *United States v. Moten, supra*, slip op. at —, typed opinion at 9-13, see also rel. br. at 60-80.

B. Claim of Misconduct in Indictment of Defendants Jones, Capra, Guarino and Dellacava

Intersimone claims the Government acted improperly by indicting Albert Lee Jones. The argument here, such as it is, is most generously described as hallucinatory. According to Intersimone, Jones, who was arrested in a 1971 narcotics case, testified for the Government and received probation. The record, however, contains no mention anywhere of Jones' testifying for the Government: indeed the opposite is the case. Moreover, the news of his probation would surely come as a surprise to Jones, since the record shows Jones was sentenced to a term of imprisonment on that case on September 26, 1972. (Tr. 5703). Moreover, Jones' indictment in this case was based upon his participation in the crime charged; indeed, he refused to cooperate with the Government, choosing instead to proceed with trial. Jones' sentence in this case was, like all sentences, within the exclusive province of the court, not the Government.

Intersimone's claims with respect to the indictment of Capra, Guarino and Dellacava require little comment. He argues that the Government knew in advance that Capra, Guarino and Dellacava would be severed, thereby allowing the Government to use evidence at trial which would otherwise have been inadmissible had these three defendants been present. Intersimone forgets that Capra, Guarino and Dellacava were severed *over Government objection* and after several defense counsel called for their severance on the ground of their unruly behavior at the pre-trial motions. Moreover, the evidence complained of was admissible not because Capra, Guarino and Della-

cava were *defendants* but because they were co-conspirators. The Government could have accomplished the same goal attributed to it by Intersimone simply by naming these three individuals as unindicted co-conspirators without charging them as defendants. Accordingly, this claim is meritless.

C. Use of Willie Womack's Name in Government Chart

The Government's chart, reproduced at p. 6 of this Brief, reflects the roles of all persons named in the indictment, of whom Willie Womack, an unindicted co-conspirator, was one. The use of such a chart was clearly proper and within the discretion of the trial judge. F. R. of Evid. 1106. Intersimone's claim of prejudice regarding the admission of testimony concerning Womack's death is also without merit. The argument was raised in the related appeal and rejected in *United States v. Moten, supra*, slip op. at —, typed opinion at 11-12; see also, rel. br. at 67-68.

D. Claims of Misconduct in Relation to the Admission of GX 42, a \$20,000 Check From Peter Fiumara to Sebastian Intersimone

Intersimone alleges that GX 42, received in evidence at trial, was not made available prior to its admission as part of the Government's discovery. The record, however, shows no objection to the admission of the exhibit on this ground and Intersimone is therefore foreclosed from pressing this claim on appeal. *United States v. Fury*, 554 F.2d 522, 527 (2d Cir. 1977); *United States v. Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966). Even were that not clearly the case, Intersimone's allegations of abuse by the Government in this regard are, once again, blatantly false and contrary to the record. While he says the Check's admission was a "complete surprise," this claim cannot be squared with Intersimone's trial

counsel's statement *on the record* that "I did not interpose an objection to the introduction of the check. Mr. Beller had asked me to stipulate to the admissibility of the check, business records rather than call Mr. Fiumara" (Tr. 5935).

Finally, Intersimone's grumbling about the exhibit being obtained by IRS summons is all beside the point since the record establishes that the exhibit was a copy of a check obtained from Fiumara himself. (Tr. 5932-5934).

E. Claims of Abuse in Connection With Congressional Hearings and Discharge of a Juror

Just exactly what point Intersimone is reaching for in connection with his complaint about certain testimony before the United States Congress remains unclear; nevertheless, since the matter is wholly outside the record it cannot form a basis for a claim here.

It ill-becomes Intersimone to complain about the discharge of a corrupted trial juror in view of what appears to have been his role in corrupting the juror. In any event, the court's conduct in handling this sensitive matter has been approved by this Court in *United States v. Moten*, *supra*, slip op. at —, typed opinion at 15; see also rel. br. at 101-103.

F. The Prosecutor's Rebuttal Summation Was Not Improper

Intersimone claims the Government's rebuttal summation prejudiced him to such an extent to require reversal. The claim is without merit. First, even Intersimone's attorney indirectly attributed improper motives to the prosecution in his summation. He noted that his client was placed at the top of the Government's chart

because "He's an Italian. And you virtually got your conviction in a narcotics case." (Tr. 8392). Although counsel did call the prosecutor "a man of integrity," he thought Jack Brown was a "liar," and, in commenting on Brown's testimony concerning the date of the four kilogram heroin sale, said: "What happened between my cross-examination and Mr. Beller's redirect examination? What caused him to become sure? Well, he had a conversation with Mr. Beller and Mr. Beller told him the date is important." (Tr. 8407, 8402).

In its rebuttal summation the Government was faced with the concededly difficult task of responding to a host of extreme, vituperative and extra-record personal attacks upon the prosecutors and Government witnesses and at the same time dealing with the record. Some examples of the abuse hurled at the Government and Government witnesses included claims that the prosecutor furnished heroin to Brown as part of his agreement to cooperate (Moten, Tr. 7713-14); that Brown was a "damn liar" and that the prosecutor because he "likes to win his case," engaged in "innuendo" and was required by his boss and his job to put "liars on the stand" (Brightman, Tr. 8068-69, 8081); that Brown was an "out and out liar" and that the Government added a few defendants to the indictment for "window dressing" (J. P. Morgan, Tr. 7799, 7807).

Accordingly, although the Government responded to these arguments, it also urged the jury to remember that each defendant was to be considered separately (Tr. 8650), and, in reviewing the summation of each defense counsel, pointed out which ones had attacked the Government and which ones had not. (See colloquy between court and counsel at Tr. 8700). Thus, prior to discussing Intersimone's summation, the prosecutor distinguished Intersimone's counsel for not having attacked or called into question the Government's integrity. (Tr. 8769). The prosecutor's summation was proper and caused no

prejudice to Intersimone. Moreover, Intersimone's claims of prejudice are belied by the jury's acquittal of some defendants entirely and other defendants on particular counts, a further measure of the jury's ability to consider the evidence carefully as to each defendant on trial. *United States v. Moten, supra*; *United States v. Corr*, 543 F.2d 1042, 1052-53 (2d Cir. 1976).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

DANIEL J. BELLER,
ROBERT J. JOSSEN,
*Assistant United States Attorneys,
Of Counsel.*

AFFIDAVIT OF MAILING

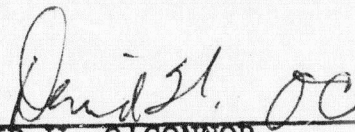
STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

DAVID W. O'CONNOR being duly sworn, deposes and says he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 13th day of September, 1977 he served a copy of the within brief and a copy of the Government's Brief in United States v. Moten, et al., by placing the same in a properly postpaid franked envelope addressed:

1. James R. Yon, Esq.
620 Madison Street
Tampa, Florida 33602
2. Sebastian Intersimone
Atlanta Pententiary
Atlanta, Georgia

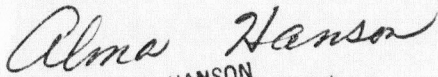
And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.



DAVID W. O'CONNOR
Assistant United States Attorney

Sworn to before me this

13th day of September, 1977


ALMA HANSON
NOTARY PUBLIC, State of New York
No. 24-6763450 Qualified in Kings Co.
Commission Expires March 30, 1978